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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~386~~. 106

LUMAN JENNISON AND HIRAM JENNISON, PLAINTIFFS IN ERROR,

vs.

EDWARD H. LEONARD, EXECUTOR, AND CORNELIA LEONARD, EXECUTRIX, OF FREDERICK B. LEONARD, DECEASED, WHO WAS SURVIVING PARTNER OF THE BELDON LUMBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

**FILED DECEMBER 24, 1872.**

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1 The United States of America, by the grace of God free and independent.

To the honorable the Supreme Court of the United States:

I, Isaac H. Parrish, clerk of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, do hereby certify that on the 23d day of November, A. D. 1872, in a certain cause pending and determined in said court, wherein Edward H. Leonard, executor, and Cornelia Leonard, executrix of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumbering Company, were plaintiffs, and Luman Jennison and Hiram Jennison were defendants, the said defendants caused to be issued a writ of error, which was allowed by the judges of said court, the original of which is as follows:

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between Edward H. Leonard, executor, and Cornelia Leonard, executrix of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Co., plaintiff, and Luman Jennison and Hiram Jennison, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears:

3 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 23d day of November, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] ISAAC H. PARRISH,
*Clerk of the Circuit Court of the United States for the Western Dis't of Michigan.*

Allowed by

S. L. WITHEY,
*U. S. Dis't Judge.*

Received and filed this 23d day of November, A. D. 1872, at — p. m.
HORACE TOMPKINS,
*Deputy Clerk.*

4 That thereupon a citation was issued which, with the proof of service thereof, is hereto attached, and is as follows:

5 The United States of America to Edward H. Leonard, execu-

tor, and Cornelia Leonard, executrix, of the last will and testament of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein Luman Jennison and Hiram Jennison are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Solomon L. Withey, judge of the circuit court of the United States for the western district of Michigan, this twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-two.

S. L. WITHEY,
*U. S. Dis't Judge.*

6 UNITED STATES OF AMERICA,
*Western dis't of Michigan, county of Kent, ss:*

On this 27th day of November, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared M. J. Linsley before me, the subscriber, Isaac H. Parrish, clerk of the United States circuit court for the western district of Michigan, and makes oath that he delivered a true copy of the within citation to Norris Blair, the attorney for the plaintiffs in said cause in the circuit court of the United States for the western district of Michigan, by delivering to said Norris, said
4 Blair being present, a true copy thereof, November 23d, 1872.

M. J. LINSLEY.

Sworn to and subscribed the 27th day of November, A. D. 1872.
ISAAC PARRISH, *Clerk.*

Rec'd and filed this 23d day of November, A. D. 1872, at 5 p. m.
HORACE TOMPKINS,
*Deputy Clerk.*

7 That on the day and year aforesaid the said defendants filed their bond, which, together with the approval of said judges, is hereto attached, and is as follows:

Know all men by these presents that we, Luman Jennison and
8 Hiram Jennison as principals, and George Weatherwax as surety, all of Georgetown, Ottawa County, State of Michigan, are held and firmly bound unto Edward H. Leonard, executor, and Cornelia Leonard, executrix of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Co., in the full and just sum of fifteen thousand dollars, to be paid to the said Edward H. Leonard, executor, and Cornelia Leonard, executrix aforesaid, their certain attorneys, successors, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 23d day of November, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas the said Luman Jennison and Hiram Jennison have prosecuted a writ of error out of the Supreme Court of the United States to the circuit court of the United States for the western district of Michi-

gan, to reverse a judgment rendered in a certain suit therein lately pending, wherein the above-bounden Luman Jennison and Hiram
9 Jennison were defendants, and the said Edward H. Leonard, executor, and Cornelia Leonard, executrix of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Co., were the plaintiffs, and have filed a copy thereof in the clerk's office of said court to reverse the judgment on said suit, and have issued a citation to the said Edward H. Leonard, executor, and Cornelia Leonard, executrix of the last will of Frederick B. Leonard, &c., citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the first day of December, A. D. 1872:

Now, therefore, the condition of this obligation is such, that if the above-named Luman Jennison and Hiram Jennison shall prosecute the said writ of error to effect, and answer all damages and costs, including all just damages for delay, if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

LUMAN JENISON. [SEAL.]
HIRAM JENISON. [SEAL.]
GEO. WEATHERAX. [SEAL.]

Approved:

S. L. WITHEY,
*U. S. Dist. Judge.*

Rec'd & filed this 23 day of November, A. D. 1872, at 5 p.m.
HORACE TOMPKINS,
*Deputy Clerk.*

10 The undersigned, clerk of said court, would respectfully return to said writ of error that on the 26th day of August, A. D. 1869, that Frederick B. Leonard, a citizen of the State of New York, surviving partner of the Blendon Lumbering Company, a copartnership composed of the said Frederick B. Leonard, Jonathan E. Whipple, and Thomas C. Brinsmade, by his attorney, George Gray, appeared in the said court and filed his declaration as commencement of suit against the said Luman Jennison and Hiram Jennison, which declaration is the words and figures as follows, to wit:

The circuit court of the United States for the western district of Michigan.

UNITED STATES OF AMERICA,
*Western District of Michigan, ss:*

Frederick B. Leonard, who is a citizen of the State of New York, surviving partner of the Blendon Lumber Company, a copartnership composed of the said Frederick B. Leonard, Jonathan E. Whipple, and Thomas E. Brinsmade, and who were all citizens of the State of New York up to and at the time of the decease of the said Jonathan E. Whipple and Thomas C. Brinsmade, plaintiffs in this suit, by George Gray, his attorney, comes into this court filing this, his declaration, as commencement of suit, and complains of Luman Jennison and Hiram Jennison, who are both citizens of the State of Michigan, of a
11 plea of trespass on the case upon promises, for that whereas the defendants heretofore, to wit, on the second day of August, A. D. 1869, at the district aforesaid, were indebted to the plaintiff in

the sum of twenty-five thousand dollars for the price and value of goods then sold and delivered by the plaintiff to the defendants, at their request; and in a like sum for the price and value of work then done and materials for the same provided by the plaintiff for the defendants, at their request; and in a like sum for money then lent by the plaintiff to the defendants at their request; and in a like sum for money then paid by the plaintiff for the defendants at their request; and in a like sum for money then received by the defendants for the use of the plaintiff; and in a like sum for money found to be due from the defendants to the plaintiff on an account stated between them.

And whereas the defendants afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then promised the plaintiff to pay him the said several last-mentioned moneys respectively on request, yet they have disregarded their promises and have not paid any of the said moneys, or any part thereof, to the plaintiff's damage of twenty-five thousand dollars, and thereupon he brings suit, &c.

GEO. GRAY,
*Plff's Attorney.*

12 The circuit court of the United States for the western district of Michigan.

UNITED STATES OF AMERICA:

FREDERICK B. LEONARD, SURVIVING PARTNER, &c.,
*vs.*
LUMAN JENNISON AND HIRAM JENNISON.

To the above-named defendants:

Please to take notice that the following is a bill of particulars of the plaintiff's demand in this cause, for the recovery of which this action is brought, to wit:

| 1867. | | | | | | |
|---|---|---|---|---|---|---|
| Oct. 16. | 80,000 | feet of lumber, | @ | $14 | ..... | 1,120 00 |
| 24. | 100,000 | do. | @ | 14 | ..... | 1,400 00 |
| Nov. 1. | 110,000 | do. | @ | 14 | ..... | 1,540 00 |
| " | 155,000 | do. | @ | 14 | ..... | 2,170 00 |
| 9. | 110,000 | do. | @ | 14 | ..... | 1,540 00 |
| " | 11,000 whitewood | do. | @ | 20 | ..... | 220 00 |
| 16. | 210,000 pine | do. | @ | 14 | ..... | 2,940 00 |
| " | 27,000 whitewood | do. | @ | 20 | ..... | 540 00 |
| 25. | 210,000 pine | do. | @ | 14 | ..... | 2,940 00 |
| | 45,000 whitewood | do. | @ | 20 | ..... | 900 00 |
| 28. | 55,000 whitewood and pine | do. | @ | 17 | ..... | 935 00 |
| | 100,000 cull | do. | @ | 10 | ..... | 1,000 00 |

Dated August 26, 1869.
Yours, &c.,

GEO. GRAY,
*Plaintiff's Attorney.*

13 Afterwards, to wit, on the 31st day of August, 1869, the said plaintiff appeared and filed proof of service of the declaration, which is as follows:

Endorsed on the above declaration was the following notice:

Copy narr.

To the within-named defendants:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit, a rule was entered in the book of common-rule, kept by the clerk of said court in his office in the city of Grand Rapids, requiring you to plead to said declaration within twenty days after the service of a copy thereof, and notice of said rule or judgment, &c.

Yours, &c.,

GEO. GRAY,
*Attorney for Pl'ff.*

Dated August 26, 1869.

The following is the return of the marshal therein:

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that on the 26th day of August, A. D. 1869, I served the within declaration upon Luman Jennison and Hiram Jennison, the within-named defendants, by delivering to each of them personally at Wyoming, in said district, a true copy thereof with like notice endorsed thereon as is herein endorsed and hereto annexed.

JAMES HENRY,
*Marshal.*
By E. H. CADY,
*Deputy.*

14 Afterwards, to wit, on the 2d day of April, 1870, the default of said defendant was entered as follows:

FREDERICK B. LEONARD, SURVIVING PARTNER of the Blendon Lumber Company, a co-partnership of Frederick B. Leonard, Jonathan E. Whipple & Thomas C. Brinsmade,
*vs.*
LUMAN JENNISON AND HIRAM JENNISON.

On reading and filing due proof of the personal service of the declaration in this cause, together with notice of the rule to plead, and more than twenty days having elapsed, and no appearance having been made, on motion of Geo. Gray, attorney for the plaintiff, ordered that the default of said defendants be, and the same is hereby, entered.

GEO. GRAY,
*Att'y for Pl'ff.*

Afterwards, to wit, on the 18th day of November, A. D. 1870, the following order was entered in said cause:

FREDERICK B. LEONARD, SURVIVING PARTNER of the Blendon Lumber Company, a copartnership composed of Frederick B. Leon-
15 ard, Jonathan E. Whipple and Thomas C. Brinsmade,
*vs.*
LUMAN JENNISON AND HIRAM JENNISON.

In this cause, the attorney for the plaintiff having appeared and consented thereto, it is ordered by the court now here that the default in

this case be, and the same is hereby, set aside, upon payment of the costs thereof to be taxed.

Afterwards, to wit, on the 21st day of November, A. D. 1870, the said defendant appeared and filed their plea and notice, which are in the words and figures as follows, to wit:

In the circuit court of the United States for the western district of Michigan.

LUMAN JENNISON AND HIRAM JENNISON *ads.* FREDERICK B. LEONARD, SURVIVING PARTNER, &c.

And the said defendants, Luman Jennison and Hiram Jennison, defendants in this suit, by Thomas B. Church, their attorney, come and defend the wrong and injury where, &c., and say that they did not undertake or promise in manner and form as the said plaintiffs
16 hath above complained against them, and of this they put themselves on the country, and the said plaintiffs doth the like.

THOS. B. CHURCH,
*Att'y for Def'ts.*

In the United States circuit court of the 6th circuit, western district of Michigan.

LUMAN JENNISON ET AL. *vs.* FREDERICK B. LEONARD, SURVIVING PARTNER, &c. No. 176.

Take notice, that by leave of court had, the said defendants on the trial of this cause will show in evidence that they both held and used the lumber described in the bill of particulars of the said plaintiffs, by virtue of certain chattel mortgages, executed to them by Edward Cole, the owner of the logs from which the lumber aforesaid was manufactured, to wit: One bearing date Feb'y 2d, 1867; one bearing date March 4, 1867; one bearing date June 3d, 1867; and duly filed in the office of the town clerk of the town of Blendon, Ottawa County, State of Michigan.

THOS. B. CHURCH,
*Att'y for Def'ts.*

To GEO. GRAY,
*Att'y for Pl'ffs.*

17 Afterwards, to wit, on the day and year aforesaid, a stipulation was filed in words and figures as follows, to wit:

The circuit court of the United States for the sixth circuit and western district of Michigan.

FREDEDICK B. LEONARD, SURVIVING PARTNER, &c., pl'ff, *vs.* LUMAN JENNISON AND HIRAM JENNISON, def'ts.

SAME PL'FF *vs.* SAME DEF'T.

In the above cause, the same being put at issue this day, it is hereby

stipulated and agreed by and between the said parties, by their respective attorneys, that the same shall be brought on for trial at the present term of said court before the court, without the intervention of a jury. The said defendants to pay to said plaintiffs the costs for witnesses incurred by the said plaintiff at the present term, up to and including this day, on taxation and notice thereof.

THOS. B. CHURCH,
*Att'y for Def't.*
GEO. GRAY,
*Att'y for Pl'ff.*

18 Afterwards, on the 9th day of May, A. D. 1872, at a session of the circuit court of the United States for the sixth judicial circuit and western district of Michigan, held at the city of Grand Rapids in said district, the following order was entered:

FREDERICK B. LEONARD, SURVIVING PARTNER of the Blendon Lumber Company,
*vs.*
LUMAN JENNISON AND HIRAM JENNISON.

And hereupon Morris and Blair came into court and give the said court here to understand and be informed that since the last continuance of this suit, and since the trial of the cause by the court without a jury, to wit, on or about the 9th day of February last, at Lansingburg, in the State of New York, the said sole plaintiff, Frederick B. Leonard, departed this life testate, the cause of action in this cause him surviving, which the said defendants do not deny but admit.

And it now appearing to the satisfaction of the court that letters testamentary have been on the 4th day of March last duly allowed and issued upon probate of the last will of said Frederick B. Leonard, deceased, by the surrogate court of the county of Rennselaer, in the State of New York, to Edward H. Leonard and Cornelia Leonard in the said
19 will named as executor and executrix thereof, who have also duly qualified as such under and by virtue of the laws of the State of New York and the State of Michigan, therefore upon motion of said Norris & Blair, attorneys for such executor and executrix, it is hereby ordered that this cause be and hereby is revived, continued, and shall be further prosecuted in the name of said executor and executrix as plaintiffs therein.

20 UNITED STATES OF AMERICA:

The United States circuit court, western district of Michigan.

EDWARD H. LEONARD, EXECUTOR, & CORNELIA Leonard, executrix of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Company,
*vs.*
LUMAN JENNISON & HIRAM JENNISON.
} Finding.

This cause having been duly submitted to the court for trial and determination, without the intervention of a jury, by stipulation of the parties in writing, filed herein, waiving a jury, and the testimony in the

cause and the argument of counsel therein having been heard by the court, and the cause having been duly submitted for the finding and judgment of the court therein, the following are found as the facts:

First. That on the first day of September, 1866, Frederick B. Leonard, Thomas C. Brinsmade, and Jonathan E. Whipple, residents of the State of *of* New York, were partners, doing business under the name of "The Blendon Lumber Company," and Stephen R. Noyes was then and has since continued to be their agent and attorney in fact; that at the time of the commencement of this suit Frederick B. Leonard was sole surviving partner of said Blendon Lumber Company.

21 That at the time of making the several chattel mortgages hereinafter set forth, the defendants named in this suit were all interested in said mortgages, and by the parties to this suit conceded to be mortgagees, whether named in said mortgages as such, or not.

Second. That on the first day of September, 1866, said Blendon Lumber Company and Edward Cole entered into a written contract, which is in the words and figures following:

"This agreement, made and entered into the first day of September, A. D. 1866, by and between the Blendon Lumber Company, by Stephen R. Noyes, their agent and attorney, of the first part, and Edward Cole, of Spring Lake, in the county of Ottawa and State of Michigan, of the second part, witnesseth as follows:

"The said party of the first part hereby agree to sell unto the said party of the second part for the sum of twenty-seven thousand dollars, to be paid as hereinafter mentioned, all the following described real estate and personal property of the said company in the county of Ottawa aforesaid, viz:

"All those certain pieces or parcels of land situate in townships No. six north, of range No. fourteen west, and described as follows:

"The southeast quarter of the northwest quarter, the west half of the northwest quarter, the west half of the southwest quarter, and

22 the southeast quarter of the southwest quarter of section No. (28) twenty-eight.

"The east half of the northeast quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the southwest quarter, and the east half of the southeast quarter of section No. (29) twenty-nine.

"The northeast quarter of the northeast quarter, and the southeast quarter of the southeast quarter of section No. (30) thirty.

"The northeast quarter, the southwest quarter, and the northwest quarter of the southeast quarter of section No. (31) thirty-one.

"The east half of the northeast quarter of section No. (32) thirty-two.

"The west half of the northeast quarter, and the east half of the northwest quarter of section No. (13) thirteen.

"The south half and the west half of the northwest quarter of section No. (14) fourteen.

"The north half of the southwest quarter, and the west half of the southeast quarter of section No. (15) fifteen.

"The northwest quarter of section No. (17) seventeen.

"The east half of the northeast quarter of section No. (21) twenty-one.

"The south half of the southwest quarter and the northwest quarter of the southeast quarter of section No. (21) twenty-one.

"The northeast quarter, the west half of the northwest quar-

22½ ter, and the northeast quarter of the northwest quarter of section No. (22) twenty-two.

"The northwest quarter and the southwest quarter of the northeast quarter of section No. (23) twenty-three.

"The east half of the southeast quarter of section No. (15) fifteen, with the mill and other buildings thereon.

"Also the north half of the northwest quarter of section No. (32) thirty-two, in township No. seven north, of range No. 13 west, in the county of Ottawa aforesaid, excepting and reserving so much and such parts thereof as have been heretofore sold and conveyed by the said party of the first part to A. C. Litchfield & Co.

"Also all the sawing timber on the following described lands, situate in township No. six north, of range No. (14) fourteen west, in the county of Ottawa aforesaid, viz:

"The southeast quarter of the northwest quarter of section No. (27) twenty-seven.

"The west half of the southeast quarter, the southwest quarter, the south half of the northwest quarter, and the southwest quarter of the northeast quarter of section No. (19) nineteen.

"The timber on said lands to be cut and removed therefrom by the said party of the second part as hereinafter provided.

"Also all the refuse cull timber now remaining on the following described lands, situate in township No. six north, of range No. (14) fourteen west, in the county of Ottawa aforesaid, viz:

23 "The west half of the northwest quarter, the west half of the southwest quarter, and the east half of the southeast quarter of section No. (5) five.

"The west half of the southwest quarter, and the east half of the southeast quarter of section No. (5) five.

"The east half of the northeast quarter, the west half of the northwest quarter, and the south half of section No. (8) eight.

"The west half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter, and the west half of the southeast quarter of section No. (9) nine.

"The northwest quarter of the southwest quarter of section No. (11) eleven.

"Also the railroad belonging to the said party of the first part, leading from section No. (15) fifteen to the Blendon Landing, together with the iron rails and other fixtures thereon, and the right of way for railroad, as the same is now owned and used by the said party of the first part.

"Also six horse-cars, one locomotive-engine, and all the other cars, tools, and implements belonging to and heretofore used by the said party of the first part in running said road.

"And the said party of the first part further agree that on receiving payment in full of the aforesaid sum of twenty-seven thousand dollars, with interest thereon from the date of these presents, at the times and in the manner hereinafter specified, and on the performance by the said party of the second part of the covenants and agreements herein contained, the said party of the first part shall and will exe-

24 cute and deliver unto the said party of the second part, or to his assigns, good and sufficient deeds of conveyance of the said lands hereby contracted to be sold, and of the said personal property and fixtures above mentioned, free from all incumbrances. Which deeds shall contain a covenant of warranty.

"And the said party of the second part hereby agrees to purchase from the said party of the first part all the said lands, and other property above mentioned, at and for the price and sum above mentioned, and to pay the same to the said party of the first part, with interest

from the date hereof at the rate of seven per cent. per annum, in the manner and at the times following, viz:

"Ten thousand dollars thereof, with interest on the whole sum, to be paid in one year from the date hereof; ten thousand dollars, with interest on the balance unpaid, to be paid in two years from the date hereof; and the residue, being seven thousand dollars, with interest as aforesaid, to be paid in three years from the date hereof.

"And it is further agreed that the said yearly payments are to be made in manner following, viz:

"For each and every thousand feet of timber cut and removed from said lands, the said party of the second part is to pay monthly the sum of three dollars, and for each and every thousand feet of timber cut and removed from the swamp lands hereinafter mentioned, the said
25 party of the second part is to pay monthly the sum of one dollar. And the said party of the second part further agrees to cut and remove from the said lands belonging to the said party of the first part at least three million feet of logs in each of said three years next ensuing after the date hereof, and in case the said monthly payments shall fall short of the yearly payments to be made as hereinbefore provided, the deficiency is to be made up by the said party of the second part.

"And it is further agreed that the said party of the second part shall have possession of the said lands and other property herein mentioned, from and after the date hereof, and shall have the use and enjoyment of the same, and shall also pay all taxes, charges, and assessments on the said lands hereby contracted to be sold, from and after the date hereof, and also all taxes, charges, and assessments on the said lands hereby reserved from sale, so long as he shall continue in possession of the same for the purpose of this agreement. And the said party of the second part also further agrees that upon the execution of these presents, he will assign over and convey unto the said party of the first part all his right, title, and interest in and to certain lands, situate in Ottawa County aforesaid, commonly known as swamp lands, and heretofore purchased from the Holland Harbor Company by John Haire, and by said Haire sold to the said party of the second part, which said
26 swamp lands are to be held by the said party of the first part as collateral security for the performance of this agreement by the said party of the second part, and are to be reconveyed to him or his assigns, when said agreement shall be fully performed.

"It is also further agreed that for the residue of the present season the monthly payment for logs cut and removed from the lands of the said party of the first part shall be two dollars per thousand feet, instead of three dollars as above provided.

"And also the cars, engine, and other personal property above mentioned, shall be used for the purpose of running said railroad, and shall not be removed or taken elsewhere during the continuance of this agreement.

"In witness whereof the said parties have hereto set their hands and seals on the day and year first above written.

"THE BLENDON LUMBER CO., [SEAL.]
"By S. R. NOYES,
*"Ag't & Att'y.*
"EDWARD COLE. [SEAL.]

"Sealed and delivered in presence of—
"J. H. McKEE, as to Cole."

[10-c't int. rev. stamp.]
[10-c't int. rev. stamp.]

The said Edward Cole entered upon the lands in said contract described, took possession of the personal property therein transferred, and proceeded to cut and remove timber from the lands until about the eleventh day of June, 1867, at which time he assigned said con-
27 tract to Thomas D. Piersons, with all his, Cole's, rights thereunto, subject only to the rights of defendants under and by virtue of three chattel-mortgages executed by Cole as next hereinafter stated.

Third. That said Cole, while engaged in cutting and removing timber as aforesaid, was furnished money & supplies by defendants, to secure the payment of which he executed to defendants three chattel-mortgages, one a bill of sale in form, dated, respectively, February 2nd, March 4th, and June 3d, 1867, and respectively in the words and figures following:

"I hereby sell and deliver to Luman and Hiram Jennison one million feet of pine saw-logs at the skidway in section 29, in town of Blendon, at the end of the south branch of the Blendon Lumber Company's railroad, for five dollars per M feet; said Jennison to pay the Blendon Lumber Company their interest in said logs when taken from the landing at Blendon, and said interest of Blendon Lumber Company being a part of said five dollars paid for said logs, the balance of the amount being received at this date by me.

(Signed) "EDWARD COLE.

"Dated this 2d day of Feb'y, 1867."

"This indenture, made the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-seven, between Ed-
28 ward Cole, of Blendon, Ottawa County, and State of Michigan, of the one part, and Hiram, Luman, and Lucius Jennison, of Georgetown, county and State aforesaid, of the other part, witnesseth:

"That the said party of the first part, for, and in consideration of the sum of six thousand dollars, ($6,000.00,) to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, & sell unto the said party of the second part all and singular the goods and chattels hereinafter mentioned, that is to say, one pair of stallions, Tippo and Farmer, Tippo a brown, Farmer a bright bay; also, a pair of geldings named Charley and George; also, one pair of geldings named Sam and John; also, one pair of geldings named Bill Haire and Bill Jones; also, one pair of sorrel horses call Tip and Charlie; also, one pair, one sorrel mare and one a sorrel horse, named Sal and Bill; one bay stallion and one bay horse, called Pete & Prince; one pair of gray horses, called Bill & Rock; one gray mare and one gray horse, called Lucy and George; also, one pair of gray ponies, called Kate & Pete, and one black horse and one roan horse, called Pete & Tom; one pair of black horses, called Mike and Negs, and all harnesses and tacklings belonging to said teams. Also, one yoke of cattle, a red & roan, Duke and Dime, known as the Hagan cattle; one yoke of cattle, red, called Tag & Berry, known as the (Gun cattle;) one yoke
29 of cattle, red, called Buck & Dick, known as the (Gun cattle;) also, one yoke of roan cattle, Stub & David, known as the B. L. Co. cattle; one yoke of brindle cattle, Buck and Brin, known as the Sawyer cattle; and all yokes and skidding-chains belonging to said cattle. Two 2-horse wagons and twelve horse-cars & chains to same, seven high-wheeled carts, with four wheels each, and chains to same. Also, about 3,500,000 feet of logs on horse-track in Blendon, and about one million feet logs (1,000,000) on locomotive track, according to esti-

mate. Also, all other logs or timber of any form or kind that may be gotten out by said Cole in Blendon during the life of this mortgage, or before, or caused to be gotten out by him, or any of his men or persons for him, and banked anywhere in said county of Ottawa, on Grand River, railroads, in woods, on logways, and from all other sources by him employed in the lumber business in Ottawa County. To have and to hold, all and singular, and the goods and chattels hereinbefore granted, bargained, and sold, or mentioned, or intended so to be, unto the said party of the second part forever. Said goods and chattels now remaining and continuing in the possession of the said party of the first part in Blendon. Provided, always, and these presents are upon the express condition, that if the said party of the first part shall and do well and
30 truly, pay, or cause to be paid, to the said party of the second part the sum of six thousand dollars, (6,000.00,) within ninety days from the date hereof, say the fourth day of June, A. D. 1867, with interest at ten per cent. without failure, then these presents, and every matter contained therein, shall cease and be null and void.

"But in case default shall be made in payment of the said sum of money above mentioned, or the interest thereon, or any part thereof, at the above limited for the payment of the same, or if the said party of the first part shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of the whole or any part of the said goods and chattles, or remove, or attempt to remove, the whole or any part thereof from the said town of Blendon, county of Ottawa, without the written assent of the party of the second part, then and from thenceforth it shall and may be lawful for the said party of the second part, their executors, administrators, or assigns, or his, her, or their authorized agent, to enter upon the premises of the said party of the first part, or any place or places where the said goods and chattels, or any part thereof, may be, and take possession thereof, and to sell and dispose of the same for the best price that can be obtained thereof, at public vendue, giving sixty days' notice of the said sale, by a written or printed notice, to be posted at one or more public place or places in the said town; and out of the money to arise by such sale thereof to pay and return the said sum of money above mentioned, and the interest thereon, and all charges of
31 such sale, (if so much there shall be,) (if any there shall be,) to the said party of the first part.

"In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

"EDWARD COLE. [SEAL.]

"JOHN HAIRE, witness."

Duly stamped.

"Know all men by these presents, that I, Edward Cole, of Blendon, Ottawa Co., Michigan, of the first part, being justly indebted unto Luman and Hiram Jennison, of Grandville, Kent Co., Michigan, of the second part, in the sum of seven thousand dollars, ($7,000,) has, for the purpose of securing payment of said debt and the interest thereof, granted, bargained, sold, and mortgaged, and by these presents does grant, bargain, sell, and mortgage, unto the said Luman and Hiram Jennison the following goods, chattels, and personal property, to wit: About four million feet, board measure, of pine saw-logs, which are located as follows, to wit: about one hundred thousand feet at the Hopkins mill, Spring Lake; about 300 thousand feet in Grand River; about 200 thousand feet at the Blendon Landing on Grand River; about two million feet on the South horse railroad, so called, of the

Blendon Lumber Co., in the town of Blendon, and about one million five hundred thousand on the West horse railroad, in said town of Blendon. Also all of the logs that are cut and *ha'lled*, and all
32 that may be cut and *ha'lled* to and on said railroad, by said Cole, which said above described property at the date of these presents is free and clear of all liens, incumbrances and levies. And for a valuable consideration, I hereby warrant the above representations to be true. To have and to hold the same forever. Provided always, and the condition of these presents is such, that if Edward Cole shall pay or cause to be paid to the said Luman and Hiram Jennison the sum of seven thousand dollars, the debt aforesaid, with the interest, at the rate of ten per cent. on or before the third day of September, A. D. 1867, then this instrument shall be void, and of no effect. And I, said Edward Cole, agree to pay the same accordingly.

"But if default be made in such payment, the said Luman and Hiram Jennison are hereby authorized to sell at public auction, after the like notice as is required by law for constables' sales, the goods, chattels and personal property herein before mentioned, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, and to retain the same out of the proceeds of such sale, the overplus or residue, if any, to belong and be returned to me, the said Edward Cole.

"And the said Luman and Hiram Jennison are hereby authorized, at any time when they shall deem themselves insecure, to take possession of said goods, chattels and personal property, and the same retain in some convenient place, at the risk and expense of the said party
33 of the first part, until the said sum of money shall become due as aforesaid, and then to dispose of the same in the manner above specified.

"In witness whereof the said party of the first part has hereunto set his hand and seal the third day of June, in the year of our Lord one thousand eight hundred and sixty-seven.

"EDWARD COLE. [SEAL.]

"Signed, sealed, and delivered in presence of—

"GEORGE PARKS."

Fourth. That early in July, 1867, Cole, having failed to pay to the defendants the sums secured by said chattel mortgages, was in default; and thereupon defendants entered on the lands in said contract of September 1, 1866, described, took possession of all timber cut by Cole, and not theretofore removed, and commenced to remove the same.

Fifth. That July 20, 1867, the plaintiff having learned that defendants were removing timber from said lands, applied to defendants and procured from them an agreement in the words and figures following:

"Whereas a certain contract made and entered into, by and between the Blendon Lumber Company, by Stephen R. Noyes, their agent, of the first part, and Edward Cole, of Spring Lake, Ottawa County, Michigan, of the second part, bearing date September first, A. D. 1866,
34 in which said Cole agreed to pay to the Blendon Lumber Company certain sums of money in consideration of timber removed from certain lands, &c. And whereas the said Cole did on the 11th day of June, A. D. 1867, sell and assign his interest in said contract and all benefits derived therefrom to Thomas D. Pearson, subject to the above conditions, and also subject to certain chattel mortgages executed to H. & L. Jennison:

"Now, in consideration of the interest acquired under said chattel mortgages, we, the undersigned, hereby agree to pay to said Blendon Lumber Company such sums of money as may be due said Blendon Lumber Company under said contract, and as may hereinafter become due on the first of each and every month for so long a time as we shall operate under said chattel mortgage.

"July 20th, 1867.

"L. & H. JENNISON,
"By LUMAN JENNISON,
"HIRAM JENNISON.

"Witness:
"THO'S D. PEARSON.
"F. A. JENNISON."

[6 cts. in U. S. revenue stamps, cancelled.]

Sixth. That defendants continued to "operate" on said land, removing timber, until the fourth day of September, 1867, at which time plaintiff claimed from defendants the balance due September 1, 1867, on the contract of date September 1, 1866, from Edward Cole, being so
35 much of the first installment of ten thousand dollars as had not been paid by the monthly payments for stumpage, amounting to $5,282.70. That defendants refused to make such payments, declaring that they were liable on their contract of July 20, 1867, for no more than the monthly payments for stumpage, which they were willing to pay, but nothing more, and declaring that if more than the stipulated price for timber removed monthly was exacted from them, they should cease to operate on said land.

That in consequence of such disagreement defendants abandoned the lands and have not since removed any timber therefrom.

Seventh. That on the 12th day of September, 1867, plaintiff entered into peaceable possession of said lands for the alleged breach of said contract, of date September 1, 1866, being the non-payment of said sum of $5,282.70, then past due and unpaid, and took *took* possession of all down timber thereon remaining not removed, amounting to one million one hundred and twenty-two thousand feet board measure; but by whom said timber had been cut does not appear.

The plaintiff caused such timber to conveyed to Grand River, then rafted up and run to a saw-mill near the mouth of said river, and had the same sawn into lumber and placed on vessels for shipment to
36 the Chicago market. That while so engaged plaintiff was not interfered with in his possession, removal, and manufacture of said timber.

That the cost and expense incurred by plaintiff in getting said timber to the mill, where the same was sawed, amounted to the sum of $5,369.64.

Eighth. That while the lumber aforesaid was on board said vessels, the defendant seized the same by replevins, running against parties other than plaintiff, and afterwards sold and converted the same to their own use. That defendants seized said lumber under claim that the logs from which it was manufactured were theirs by virtue of their said chattel mortgages from Edward Cole, and on which mortgages the*ir* was due and unpaid over ten thousand dollars.

Ninth. That the value of said lumber at the place of seizure by defendants was twelve dollars per thousand feet, exclusive of the saw bill, which was paid by defendants, amounting to the sum of thirteen thousand four hundred and sixty-four dollars.

That the last cargo of said lumber was converted about December 12th, 1867.

That after this cause was submitted, the plaintiff, Frederick B. Leonard, departed this life in the State of New York, testate, leaving
37 Edward H. Leonard, executor, and Cornelia Leonard, executrix, (residents and citizens of New York,) of his last will & testament. That such executor and executrix qualified as such, under and in accordance with the laws of the State of New York and the State of Michigan, in the western district thereof, and that this cause was only revived and continued in the names of such executor & executrix previous to the date of this finding.

Upon the facts as above found, the court holds and finds the law to be—

I. That the contract of September 1st, 1866, was an executory agreement "to sell." That no title passed by virtue thereof, to Cole or his assignee, to any portion of the land or timber described therein. That the stipulation therein contained in reference to monthly payments for timber to be cut and removed, operated as a license to Cole or his assignees to cut and remove annually three million feet or more, so long as Cole suffered no breach of his agreements to pay. But when a breach occurred, and entry by the plaintiff in consequence, such license was suspended, and could be restored only by waiver on the part of the plaintiff, or by paying whatever was in arrears.

II. That no title passed to Cole or his assignees to any timber
38 cut and not removed at the time of breach and entry by plaintiffs.

That plaintiff's entry, September 12, 1867, for breach, occasioned by nonpayment under the Cole contract, being continued and tacitly acquiesced in by Cole's assignees, restored to plaintiff both possession and right of property in lands and timber, and that the seizure subsequently by defendants of the lumber produced from such timber, rendered them liable to plaintiffs in this form of action for the value thereof at the place of seizure, with interest thereon from the date of conversion.

Let judgment be entered in favor of plaintiff and against defendants for the sum of seventeen thousand one hundred and thirty-three dollars, ($17,133.)

May 27, 1872.

S. L. WITHEY,
*U. S. Dist. Judge.*

39 At a session of the circuit court of the United States for the western district of Michigan, begun and held at the city of Grand Rapids, on the 12th day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh—present, the Hon. Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

EDWARD H. LEONARD, EXECUTOR, AND CORNELIA Leonard, executrix, of the last will of Frederick B. Leonard, who was surviving partner of the Blendon Lumber Company,
*vs.*
LUMAN JENNISON AND HIRAM JENNISON.

This cause having been brought on to trial before the court without a

jury upon stipulation filed, and the court having heard the proofs and allegations of the parties and the argument of counsel, and due deliberation having been thereupon had, the court thereupon finds for the plaintiffs and assesses the plaintiffs' damages at the sum of seventeen
40 thousand one hundred and thirty-three dollars over and above his costs and charges by them about their suit in that behalf expended.

It is therefore considered by the court now here that the said plaintiffs do recover against the said defendants their damages assessed aforesaid, together with their costs and charges aforesaid to be taxed, and that they have execution thereof.

Afterwards, to wit, on the 23d day of September, 1872, the defendants, by their attorney, Thomas B. Church, appeared and filed their motion for a new trial, with an affidavit thereto attached, which are in the words and figures as follows, to wit:

In the United States circuit court for the 6th circuit and western district of Michigan.

EDWARD H. LEONARD, EXECUTOR, &C., *vs.* HIRAM JENNISON AND LUMAN JENNISON. } Judgment for $17,133.

And now comes the said defendants, by Thomas B. Church, their attorney, and moves the court that the judgment rendered in this cause be set aside and a new trial thereof granted, for the reason that the damages rendered are excessive.

And further, that the court erred in holding that the said defendants lost the right to reclaim and retake the logs or the lumber manufac-
41 tured therefrom, which were covered by the chattel mortgages on the trial of said cause exhibited and proven; because the maker thereof, one Edward Cole, had forfeited, prior to said reclaiming or taking, but after the making and filing of said mortgages, his contract for purchase of Blendon Lumber Company lands to the said company.

And further, that said defendants were surprised on the trial of said cause by the evidence of the plaintiffs going to show such a forfeiture; and since said trial have discovered evidence before not known; that said forfeiture claimed by plaintiffs on said trial to have been made never was made, but that said contract was allowed to remain in full force, and was assigned to one Ransom Gardner, by said Cole, after the time of the alleged forfeiture, and recognized by said company in the hands of said Ransom Gardner, as will appear from the affidavit of Tho's B. Church on file.

THO'S B. CHURCH,
*Att'y for Def'ts.*

In the circuit court of the United States for 6 circuit and western district of Michigan.

EDWARD H. LEONARD, EXECUTOR, &C., *vs.* HIRAM JENNISON AND LUMAN JENNISON. } Judgment, $17,133.

STATE OF MICHIGAN,
*County of Kent, ss:*

42 Thomas B. Church, duly sworn, says that he is the attorney of

the defendants; that he attended the trial of said cause with the counsel of the said defendant, and Darwin Hughes; that on said trial the question arose of the time of an alleged forfeiture by one Edward Cole of his contract with the Blendon Lumber Company, for the purchase of certain lands, on which the logs had been cut, which had been mortgaged to defendants by said Cole.

That said defendants were surprised by said inquiry, and the evidence respecting the same, given by one Frederick B. Leonard and one Capt. Mayer, witnesses in behalf of the then plaintiff of record.

That since said trial inquiry has been made of one Ransom Gardner by this affiant, that he received an assignment of the said contract from the said Cole some time in the month of September, 1868, after the time of the claimed forfeiture; that on said contract he soon thereafter, and at times since, has paid to the said company sums of money in discharge and fulfillment so far of the same, the said contract being in full force and virtue between him and the said Blendon Lumber Company, and that the time of the said assignment was not there at said trial known to this affiant.

That this affiant in behalf of said defendants did request the said Gardner to make affidavit of the said assignment and payment,
43 for the purpose of a new trial, but he refused so to do, saying he should give no evidence except under legal process in said cause, and this affiant verily believes that what was stated to him by said Gardner is true.

THO'S B. CHURCH.

Subscribed & sworn before me this 23d day of September, A. D. 1872.

S. L. WITHEY,
*U. S. Dis't Judge.*

At a session of the circuit court of the United States for the western district of Michigan, begun and held at the city of Grand Rapids on the 23d day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh.

Present, the honorable Solomon L. Withey, district judge. Among the proceedings then and there had were the following, to wit:

| | |
|---|---|
| EDWARD H. LEONARD, EXECUTOR, AND CORNELIA LEONARD, executrix of the last will of Frederick B. Leonard, deceased, who was survivor of the Blendon Lumber Company, | Assumpsit. |
| *vs.* | |
| 44 LUMAN JENNISON AND HIRAM JENNISON. | |

In this cause the motion to vacate the judgment heretofore had on the 24th day of September last upon the finding herein filed and for a new trial having been heretofore argued and submitted by the counsel of the respective parties, and due consideration thereon being had, it is now by the court ordered and adjudged that the judgment hereinbefore had in this cause be set aside and a new trial granted, unless the plaintiffs shall remit so much of the judgment as shall be in excess of eleven thousand four hundred and sixty-one dollars. And thereupon the said plaintiffs, by their counsel, L. D. Norris, appear in open court and remits said judgment down to said amount. Whereupon it is

further ordered that the motion aforesaid be, and the same is hereby, refused, and that said judgment stand at the sum of eleven thousand four hundred and sixty-one dollars.

45 WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Isaac H. Parrish, clerk as aforesaid, do hereby certify that I have compared the above and foregoing with the original files and records in said cause in my office, and that the same are true copys thereof, and the whole of such originals.

Witness my official signature and the seal of said circuit court, at Grand Rapids, this 29th day of November, A. D. 1872.

[SEAL.] ISAAC H. PARRISH, *Clerk.*

Fees, $12.

(Indorsement on cover:) No. 386. Luman Jennison and Hiram Jennison, plaintiffs in error, vs. Edward H. Leonard, ex'or, & Cornelia Leonard, ex'tx of Frederick B. Leonard, dec'd, who was surviving partner of the Blendon Lumber Company. W. Michigan C. C. U. S. Filed 24th December, 1872.

# SUPREME COURT

—OF—

# THE UNITED STATES.

LUMAN JENNISON AND
HIRAM JENNISON,
*Pl'ffs in Error,*

VS.

EDWARD H. LEONARD AND
CORNELIA LEONARD,
Executor and Executrix, &c.,
*Def'ts in Error.*

Error to the Circuit Court of the United States for the Western District of Michigan.

## Points and Brief for Pltffs. in Error.

M. J. SMILEY AND D. DARWIN HUGHES,
*Counsel for Pltffs. in Error.*

GRAND RAPIDS, MICH.:
M. H. CLARK & CO., STEAM BOOK AND JOB PRINTERS.
1874.

# SUPREME COURT

—OF THE—

# UNITED STATES.

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LUMAN JENNISON,
and
HIRAM JENNISON,
*Pl'ffs in Error,*
ads.
EDWARD H. LEONARD,
and
CORNELIA LEONARD,
Executor, Executrix, &c.,
*Def'ts in Error.*

## BRIEF OF PLAINTIFFS IN ERROR.

### POINTS RELIED UPON.

First.—The Court below erred in finding as matter of law, that the entry of the plaintiff on the 12th of September 1867 into possession of the lands and down timber,

worked a forfeiture by call of the contract between him and the Blendon Lumber Company of September 1st, 1866.

Bingham on Real Property, 783, 786, 788, 793.
Shafer vs. Niner, 9 Mich., 253.
Edgerton vs. Packham, 11 Paige, 358.
D'Arras vs. Keyser, 26 Pa. St., 249.
Lloyd vs. Cattell, 4 Bro. Ch., 469.
Clute vs. Jones, 28 N. Y., 280.
Bowen vs. Schuyler, 41 Ill., 195.
Wilber vs. Flood, 16 Mich., 40.
Ayers vs. Hewitt, 19 Me., 281.
Kimball vs. Cunningham, 4 Mass., 504.
Smith vs. Doty. 24 Ill., 163.
Buchenau vs. Harney, 12 Ill., 336.
Crane vs. O'Reilly, 8 Mich., 315.
Comp. Laws Mich. 1871, (4304).
Taylor's Landlord & Tenant, 291.
Smith vs. Blaisdell, 17 Vt., 200.
Doe dem., Willson vs. Phillips, 2 Bing., 13.

Second.—The Court below erred in finding as matter of law that no title passed to Cole or his assignees to any timber cut and not removed at the time of breach and entry by plaintiff.

Fuhr vs. Dean, 26 Mo., 116.
Wood vs. Manly, 11 Adolph & Ellis, 34.
Snowdon vs. Wilas, 19 Ind., 10.
Buck vs. Pickwell, 27 Vt., 157.
Bingham on Real Property, 111.
Nettleton vs. Sykes, 8 Met., 34.
Clafton vs. Carpenter, 4 Met., 582.
Tower vs. Walcott, 15 Gray, 541.
Pratt vs. Ogden, 34 N. Y., 22.

Third.—The Court below erred in finding that a breach of the contract by Cole would defeat the rights of the Plaintiffs in Error under their agreement of July 20th, 1867, with the Blendon Lumber Company.

Fourth.—The Court below erred in refusing the motion for a new trial.

D. DARWIN HUGHES,
*Counsel for Plaintiffs in Error.*

## STATEMENT OF THE CASE.

This was an action of assumpsit on the Common Counts, commenced in the Circuit Court for the Western District of Michigan, by Frederick B. Leonard, surviving partner of the Blendon Lumber Company, a partnership composed of the said Frederick B. Leonard, Jonathan E. Whipple and Thomas E. Brinsmade, against the Plaintiffs in Error, to recover the value of a quantity of lumber, claimed in the bill of particulars of plaintiff's demand, filed with his declaration, to be worth the sum of over Seventeen Thousand Dollars.

The Defendants in said declaration, who are Plaintiffs in Error, plead the general issue and gave notice that they would prove thereunder on the trial that they held and used said lumber by virtue of certain chattel mortgages executed to them by Edward Cole, the owner of the logs from which the lumber was made, that is to say:

One dated February 2d, 1867.
One dated March 4th, 1867.
One dated June 3d, 1867.

After the issue was so joined, the death of the plaintiff

was suggested on the record and the case revived in favor of the present plaintiff, his personal representatives.

In May 1872, by stipulation between the parties, a trial was had before Hon. S. L. Withey, District Judge, who made a special finding of the facts and the law, and on the 12th of September 1872 entered judgment thereon, against the Plaintiffs in Error for the sum of $17,133 with costs to be taxed.

On the 23d of September 1872 the Plaintiffs in Error moved for a new trial, on the ground of surprise and newly discovered evidence, basing the same on the affidavit of Thos. B. Church.

On the 24th of September 1872 the Circuit Court ordered a new trial, unless the plaintiffs would remit the judgment down to $11,461. The plaintiff thereupon did remit the same down to that sum and the motion for a new trial was thereupon refused, and the Plaintiffs in Error sued out their writ, removing the case into this Court for review.

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## ARGUMENT.

It is submitted that the Court in which the trial in this cause was had, erred on the following points:

### I.

In holding that the entry made by the plaintiff on the 12th of September, 1867, upon the lands and down timber worked a forfeiture or rescession of the contract with Cole for the sale of the land and timber.

This entry was made on account of the failure of Cole to pay the balance of the $10,000 which matured on the 1st of

September 1867, and it is submitted that such failure or default did not authorize the plaintiff to rescind the contract—to re-enter on the land or personal property, or to revoke the license to cut and remove.

The question depends upon the materiality or immateriality of time in the Cole contract, or whether in the language of the authorities time is of the essence of the contract under all the circumstances of the case.

It is not forgotten that upon the subject of materiality of time in such contracts, a great deal has been said, and that there are conflicting cases, but is believed that much of the conflict is more apparent than real.

At all events out of the cases upon the subject certain sufficiently well defined rules may be adduced which govern this case.

Before adverting to these rules and the authorities declaring them, let us see what this contract is.

## ABSTRACT OF CONTRACT.

Agreement September 1, 1866, between B. L. Co. and Ed. Cole.

The company agree to sell Cole for $27,000 the real and personal property described, and on receiving payment in full with interest at the time and in the manner specified, and on performance by Cole of the covenants and agreements to execute to Cole a deed with warranty.

Cole agrees to purchase and pay with int., as follows:

$10,000 and interest on whole, in 1 year.
$10,000 " " " " " 2 years.
$7,000 " " " " " 3 years.

As follows:

Monthly $3 per M stumpage for all cut and moved from land, and $1 monthly per M cut and moved from swamp land, and Cole to cut and move 3,000,000 a year. If these monthly payments fall short of the yearly payments the deficiency to be made up.

Cole to have possession after date and their use and enjoyment.

Cole to pay taxes and also taxes on the land reserved from sale as long as he in possession of the same.

Cole to assign to Company certain Ottawa lands, called swamp lands as collateral security for performance of the agreement, which are to be reconveyed to him on performance of the agreement.

For the present season stumpage to be $2, instead of $3.

Cars and personal property to be used in running the R. R., and not to be taken away.

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If time is of the essence of this contract then the plaintiff had a right to enter for a breach on certain terms and if it is not then he had no right to enter, and the contract has not been forfeited.

I do not now argue what would result if the entry were legal. That is the subject of a separate point. It is clear if the plaintiff had no right to enter or forfeit the contract, the title of the down logs remained in the defendants.

Although it was once held to the contrary, it is now an established rule that the question of the materiality of time

in these agreements is a question of intention of the parties as expressed in the contract.

Bingham on Real Property, 783, 786.
Shafer vs. Niver, 9 Mich., 253.

What was the intention of the parties in this case? Manifestly that it was not material, for the following reasons:

There is no proviso for re-entry for breach and no agreements that a failure to pay shall put an end to the contract.

Payment is made a condition precedent to a conveyance, but not to possession, or to cutting and removing. Not a word is said about the possession which Cole took by way of performance even going back to plaintiff in any event, while it is provided as to the land on which timber only is sold that Cole shall pay the taxes as long as he has possession for the purpose of the contract.

The plaintiff took the Ottawa lands as collateral security for performance by Cole, showing a clear intention that no right of recission remained.

When viewed in the light of this rule, it is clear that the parties did not intend to make the time of payment material, so that failure to pay on the day would work a forfeiture.

Another rule is that when payments are to be made in installments at specified times, the time for the first installment is material, and the time for the others is immaterial, if the first has been paid.

Bingham on Real Property, 793.
Edgerton vs. Packham, 11 Paige, 358.

Under this rule the eleven monthly payments were made and on the failure to make the 12th plaintiff entered. We

insist he was a trespasser and that ejectment would lie against him.

D'Arras vs. Keyser, 26 Pa. St., 249.

Another rule upon the subject is, that

Time is not essential in real contracts, unless by express stipulation, or clearly from the nature of the circumstances.

Bingham on Real Property, 788.

26 Pa. St., 249, and cases there cited.

When nothing has been done by either party under an agreement, a party may rescind for want of performance in time.

Lloyd vs. Cottell, 4 Bro. Ch., 469.

I think these rules are clearly established by the authorities.

In 9 Mich., 258, the Court said as the contract was in the usual form, and the parties had not treated time as material. A failure to pay in time would not forfeit it. In that case there was undoubtedly a proviso for re-entry, as that is the ordinary form.

In the case at bar the parties had not treated time as material. The stumpage was paid up to July 1867 only, and yet the defendants were allowed to go on. And in September the entry was not for non-payment *of stumpage*, but for non-payment of the balance of first installment of $10,000. This was a waiver of the time of payment at law as well as in equity.

It may be true that at law Cole could not maintain an action againt plaintiff on refusal to deed, because he could not prove performance of the condition precedent of pay-

ment, but it by no means follows that by this non-payment he forfeits what he has put money and labor into and changed into personal property, under the agreement, and it by no means follows that he is not entitled to possession according to the terms of the contract.

Clute vs. Jones, 28 N. Y, 280, is a case at law, holding time not material.

The parties did not intend to give the right to resciud, because no provision is made for such an event in the contract.

There is no provision for forfeiture of what had been paid.

No provision as to what is to be done with the swamp lands.

If then plaintiff could rescind it is on the terms which the law imposes in cases of rescission, and not on any terms provided by the contract.

If he could rescind at all it is on the terms of returning the Ottawa land, and the purchase money received. This must be done even in cases of fraud.

Bowen vs. Schuyler, 41 Ill., 195.
Wilber vs. Flood, 16 Mich., 40.
Ayers vs. Hewitt, 19 Mo., 281.
Kimball vs. Cunningham, 4 Mass., 504.
Smith vs. Doty, 24 Ill., 163.
Buchanan vs. Horney, 12 Ill., 336.

So far the question has been considered from the standpoint of the Cole contract, and assuming that the relations between the parties were those provided by that instrument.

The agreement of July 20, 1867, it is claimed, makes the case a stronger one for the defendants. The plaintiffs apply for and accept from the defendant an agreement to pay stumpage so long as they should operate under the chattel mortgages.

This is an express license by agreement to the defendants and could not be revoked to their injury or at all. It is an agreement upon consideration to allow the defendants to cut and remove, which defendants have ever been ready to perform.

Can the plaintiff after defendant has invested money in cutting the logs and before removal, rescind this agreement or revoke this license and cheat defendants out of the money invested in cutting it? We insist not.

Again, it must not be lost sight of that as to some of the lands the Cole contract was to sell the timber and not the lands. This it is believed could never be revoked, and if it was all cut timber would belong to defendant.

My position is that by the terms of the agreement with Cole he was to have possession to cut the timber, whether he made default or not, and that defendant had this right for a stronger reason and plaintiffs must look to their collateral security and the covenants of Cole, and retain their deed for their security and that the covenants to cut timber are independent.

But suppose this not to be so. Then Cole and defendants were tenants at will, and entitled to three months notice to quit to terminate the tenancy.

Crane vs. O'Reilly, 8 Mich., 315.

The Statute of Michigan on the subject of terminating tenancies at will, is as follows:

"All estates at will or by sufferance may be determined by either party, by three months notice given to the other party."

Compiled Laws, 1871, (4304.)

But the best reasoning is that it is a demise for three years in which the 9,000,000 feet of timber is to be cut and removed.

The agreement is to cut and remove "3,000,000 a year, for three years," and that Cole shall "*have possession of the lands, &c., from and after the date hereof,*" and "*have the use and enjoyment of the same and pay taxes on the lands to be sold.*"

Pay taxes on the reserved lands, so long as he occupies them for the purposes of the agreement.

There is a distinction made between the sold lands and the stumpage lands—the latter are spoken of as not to remain in possession of Cole for a definite time, while the others are not referred to.

It is then a demise for three years or until nine million is cut without any proviso for re-entry, and without such proviso no re-entry can be made.

Taylor's Land and Tenant, 291.
Smith vs. Blaisdell, 17 Vermont, 200.
Doe dem, Willson vs. Phillips, 2 Bing., 13.

II.

But suppose the plaintiff could rescind the contract, or revoke the license to cut and remove the timber, then it is

insisted that the title to all down timber was in the defendants and the license to remove it was irrevocable, because,

It was a license coupled with an interest.

By cutting the timber and putting money and labor into it, the license became a contract.

And by reason of part execution of the license, it could not be revoked as to down timber.

It would seem that the reasoning as well as the cases on this point are very clear.

Fuhr vs. Dean, 26 Mo., 116.

A license is revocable unless it has been executed and the party has incurred expense on the faith of it, so that he would be injured by its revocation.

11 Adolph & Ellis.

Sale of hay on premises of vendor is an irrevocable license to enter and remove it.

Snowdon vs. Wilas, 19 Ind., 10.

If a license is coupled with an interest, or it be upon consideration, it is irrevocable.

Buck vs. Pickwell, 27 Vt., 157—166.

If contract was upon consideration, though verbal, the trees when cut would vest in defendant, although contract rescinded.

Bingham on Real Property, 111.

Nettleton vs. Sikes, 8 Met., 34.

Agreement to cut trees and pull bark by parol. Held that as fast as cut the title passed.

Clafton vs. Carpenter, 4 Met., 582.
Tower & Walcott, 15 Gray, 541.
Pratt vs. Ogden, 34 N. Y. 22.

III.

The Court erred in refusing to grant the motion for a new trial.

The affidavits filed in support of the motion plainly showed that the defendants were surprised on the trial by the testimony of Leonard, and that the newly discovered evidence would prove that the Cole contract was never forfeited, but was treated as outstanding and payments received upon it, long after the entry for forfeiture.

M. J. SMILEY,
*Att'y for Pl'ffs in Error.*

D. DARWIN HUGHES,
*of Counsel.*

# *Supreme Court*

OF THE

# UNITED STATES.

No. 106. (Dec., 1874.)

LUMAN JENNISON and
HIRAM JENNISON,
Plaintiffs in Error,

*VS.*

EDWARD H. LEONARD, Executor, and
CORNELIA H. LEONARD, Executrix
of FREDERICK B. LEONARD, who
was surviving partner of the Blendon
Lumber Company,
Defendants in Error.

**Error to the Circuit Court of the United States,**

**FOR THE WESTERN DISTRICT OF MICHIGAN.**

***Return Filed December 24, 1872.***

# Points for Defendants in Error.

NORRIS, BLAIR & STONE,
OF COUNSEL,
GRAND RAPIDS, MICHIGAN.

GRAND RAPIDS, MICH.
C. N. WHITE, PRINTING AND BOOKBINDING.
1874.

# Supreme Court of the United States,

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vs.
EDWARD H. LEONARD, Executor, and CORNELIA H. LEONARD, Executrix of FREDERICK B. LEONARD, who was surviving partner of the Blendon Lumber Company, Defendants in Error.

There appears in the RECORD and SPECIAL FINDINGS (there are no exceptions, hence no Bill of Exceptions):

### I—A SINGLE POINT.

Are the findings of fact legally sufficient to sustain the *judgment?*

### II—PLEADINGS AND PROCEEDINGS.

1869, Aug. 26th.—Frederick B. Leonard, a citizen of New York (since deceased), as surviving partner of the "Blendon Lumber Company," a copartnership, before that operating in pine lands and lumber on the east shore of Lake Michigan, began suit, in the U. S. Circuit Court for the Western District of Michigan, by declaration in assum-

sit (waiving the tort, as is competent, under the laws and practice obtaining in that Circuit. Compiled Laws of Michigan, 1871 : Compiler's Section, 6,175—Watson vs. Stevens, 25 Mich., 386) against the Plaintiffs in Error herein, citizens of Michigan, resident in the said Western District, for the seizure, sale and conversion by them of about 1¼ million feet of pine lumber, valued at about $14,000. Record, p. 3 and 4.

1869, Aug. 26th.—Declaration served on both defendants. R. p. 5.

1870, April 2d.—Their default for want of appearance was entered. R. p. 5.

1870, Nov. 18th.—This default opened on terms. R. p.5.

1870, Nov. 21st.—Defendants plead the general issue and gave notice of special matter of defence, to wit : that they (defendants) held and used the lumber described in the plaintiffs' bill of particulars by virtue of three chattel mortgages (R. p. 6) given in full in the findings and hereinafter sufficiently abstracted.

At the same time a trial by jury was waived in writing. R. p. 7.

1872, May 9th.—The plaintiff (below) Frederick B. Leonard's death was suggested and the cause revived and continued in the name of the Defendants in Error, citizens of New York and his legal representatives, and the cause was tried and submitted. R. p. 7.

1872, May 27th.—Written findings of fact. R. p. 7–15.

1872, Sept. 12th.—Judgment for plaintiffs (below) for $17,133. R. p. 16.

1872, Sept. 23d.—A motion for a new trial by defendants. R. p. 16.

1872, Nov. 23d.—New trial refused [upon condition that plaintiffs remit of said judgment all but $11,461] which being done, judgment at $11,461. R. p. 17 and 18.

1872, Nov. 23d.—Writ of error sued out and citation. R. p. 1.

" " " Citation served. R. p. 2.

" " " Bond filed and approved. R. p. 2-3.

## III—FINDINGS OF FACT—CONDENSED.

*First:* 1866. Sept. 1.—The Blendon Lumber Co. agreed in writing to sell to one Edward Cole:

*A.* 3,100 acres of pine land, with saw mill buildings and railroad thereon.

*B.* All the sawing timber on 400 other acres of land—this "timber to be *cut* and *removed* as hereinafter provided."

*C.* All the refuse cull timber on 1,280 other acres of land.

*D.* A railroad used to operate this summer and winter lumbering establishment.

*E.* The cars (6), engine (locomotive) (1) and tools and implements used in running the road.

*Second:* It agreed on receiving $27,000 and interest at seven per cent., and on performance of Cole's covenants, to execute, deliver and convey good title to above.

*Covenants to pay and convey are dependent.*

1840. Low v. Marshall. 17 Me., 232.
1853. Ellis v. Hubbard. 4 Ind., 206.
Ireland v. Chauncey. Ibid, 224.

*Third:* Cole agreed to buy and pay as follows:

$10,000 and interest on whole sum September 1, 1867.
$10,000 " " " " " 1, 1868.
$7,000 " " " " " 1, 1869.

The above yearly payments were to be *made up* as follows: Cole was to "*cut* and *remove*" at *least* 3 million feet each year for each of the three years ensuing, and to pay monthly $3 per M (only $1 per M from "swamp lands") for timber he (Cole) shall "*cut* and *remove*"—deficiency between *monthly* payments of $3 per M or $1 per M. and *yearly* payment of $10,000 and interest made up on day yearly payments fall due.

Cole to have possession of property—its use and enjoyment, is to pay all taxes "so long as he shall continue in "possession of the same for the purpose of the agreement" —*agrees* to convey to Blendon Co. certain "swamp lands," to be held by it as collateral security for Cole's performance of this agreement.

The first season's *monthly* payment is, at the close of the agreement, reduced to $2 per M. "Cars, engine and "other personal property, above mentioned, shall be used "for the purpose of running said railroad, and shall not be "removed or taken elsewhere during the continuance of the "agreement."

*Fourth:* Cole entered and proceeded to "*cut* and *remove*" timber. Plaintiffs in Error furnished him money and supplies and took three chattel mortgage securities as follows:

(1) Feb. 2, '67, for $5,000 on one million feet of pine saw logs, "said Jennisons (Plaintiffs in Error) *to pay the* "*Blendon Lumber Co. their interest in said logs, when* "*taken from the landing at Blendon, and said interest of* "*Blendon Lumber Co. being a part of* * * *$5 per M paid* "*for said logs.*" R. p. 11.

(2) March 4, '67, for $6,000 to Plaintiffs in Error and one Lucius Jennison, on a large amount of personal—not covered by Cole's agreement with B. L. Co.—and also on

"12 horse cars and chains to same, * * about 3½ million feet of logs on horse track in Blendon, and about one million feet of logs on locomotive track, according to estimate, also all other logs or timbers of any form or kind, that *may be gotten out by said Cole in Blendon during the life of the mortgage, or before, or caused to be gotten out by him or any of his men or persons for him and banked anywhere in said county of Ottawa.* R. p. 12

Conditioned to pay $6,000 June 4, '67, 10 per cent.

(3) June 3, 1867, for $7,000 to Plaintiffs in Error. Covers four million feet board measure of pine saw logs, located as follows: about 100 M feet at Hopkins' Mill, Spring Lake; about 300 M in Grand River; about 200 M at the Blendon Landing; about 2,000 M on the south horse railroad, so called, of the Blendon Lumber Co; 1,500 M on the west horse railroad in said town of Blendon; "also all of the logs that are cut and *ha'lled* and all that *may* "*be cut and ha'lled* to and on said railroad by said Cole." (R. p. 13.) Conditioned to pay $7,000, 10 per cent., on or before Sept. 3, '67. [B. L. Co's recognized stumpage on 4 million would be $8,000.]

*Fifth:* About June 11, '67, Cole executed an assignment of his interest in the Blendon Lumber Co. agreement to one N. Thomas Piersons, subject however to these chattel mortgages. R. p. 11.

*Sixth:* Early in July, 1867, Plaintiffs in Error entered on the Blendon Lumber Co. lands and premises, bargained to Cole, and by him assigned to Piersons, took possession of all timber cut by Cole and not before that removed, and began to remove it. R. p. 13.

*Seventh:* July, 20, '67, Blendon Lumber Co. having learned that the Jennisons were engaged in the removal of

the timber cut by Cole, got from them an agreement, which among other things recites the following, (R. p. 13 and 14) referring to the original agreement with Cole, * * "in which said Cole agreed to pay the Blendon Lumber "Company *certain sums of money in consideration of tim-* "*ber removed* from certain lands, &c., * * now in consid- "eration of the interest acquired under said chattel mortg- "ages, we * * agree to pay to said Blendon Lumber "Company (1) *such sums of money as may be due said* "*Blendon Lumber Company* UNDER SAID CONTRACT, (2) "and as may *hereinafter become due on the first of each* "*and every month for so long a time as we shall* OPERATE "*under said chattel mortgages.*"

Plaintiffs in Error, as chattel mortgagees of Cole, continued to "OPERATE" on said land (i. e. removed timber) up to Sept. 4, 1867. (R. p. 14.) Sept. 1, '67, the amount of "*monthly*" payments per M then lacked $5,282.70 of equaling the yearly payment of $10,000 and interest on $27,000 then due. Demand for this deficiency was made of the Plaintiffs in Error by the B. L. Co., which by their agreement of July 20th, '67, they had assumed and agreed to pay. They refused to pay it, and *abandoned* (Sep. 4, 1867) *the lands and pine saw logs thereon.* R. p. 14.

*Eighth :* The Blendon Lumber Co. entered, Sept. 12, 1867, into *peaceable* possession of their lands, for *conditions broken*, to wit., the non-payment of the installment due Sept. 1, 1867. On Sept. 12, '67, it found, when it so entered into possession of its lands, 1,122,000 feet of "*down timber thereon remaining* NOT REMOVED."

R. p. 14, folio 35.

NOTE.—Whether this "*down timber*" had been cut by Cole on or prior to June 3, '67, the date of the last chattel mortgage to Plaintiffs in Error ; whether it had been cut

by Piersons between June 11, '67, the date of his assignment from Cole (if a *license* "to cut and remove" is capable of such assignment ?) and early in July, '67, when the plaintiffs took possession and began "to operate;" whether it had been cut by the Plaintiffs in Error between early in July, '67, and Sept. 4, '67, while they were "operating" as mortgagees, in possession of the personal property claimed to be covered by their mortgages, [say the last mortgage, for they are plainly cumulative and given for the same *increasing* debt,] does not appear, for the court find, *"but by whom said timber had been cut does not appear."*

R. p. 14, folio 35.

*Potior est conditio possidentis ?*

*Ninth :* The B. L Co. being so in *peaceable* possession of their abandoned lands and timber, for condition broken, added in money and labor $5,369.64 to the value of the "down timber" at the mill, on its way to market.

R. p. 14, folio 35.

*Tenth :* In this condition it was seized by Plaintiffs in Error, in replevin suits, to which it was not a party, and by them *sold and converted.* R. p. 14, folio 36.

*Eleventh :* The value of this lumber at the place of seizure was $13,464. (R. p. 14, folio 36.) The date of the last cargo converted was Dec. 12, 1867.

## IV—FINDINGS OF LAW—PARGRAPHED AND CONDENSED.

1. That the contract of Sept. 1, 1866, was an *executory* agreement *to sell.*

2. That no *title* passed by virtue thereof.

3. That it contained a *license "to cut and remove,"* good as long as there was no breach of vendees' covenants.

4. That such *license* was suspended by an entry for breach of vendees' covenants.

5. That no title passed to vendees or assigns to any timber *"cut" and not* REMOVED at the time of breach and entry.

6. That the entry of Sept. 12, 1867, for breach was continuous and *"tacitly acquiesced in"* by vendees, and both possession and right of property to land and timber was restored to vendor.

7. That the seizure of timber by Plaintiffs in Error was wrongful and rendered them liable in this form of action to B. L. Co. for the value thereof ($13,464), with interest thereon (computed at $3,669) from date of conversion of last cargo, (Dec. 12, '67.)

8. Let there be judgment for $17,133.

NOTE.—Subsequently *reduced* and accepted as reduced, upon some basis known to the Judge below and by him deemed equitable (not shown in this Record), to $11,461.

## V—GENERAL CONCLUSIONS.

*First.* This judgment should be affirmed, with interest, from the day of its rendition, Sept. 12, 1872, and with the usual ten per cent. damages for delay.

(Authorities as to damages.)

Cotton v. Wallace. 3 Dall., 302.
Barrow v. Hill. 13 How., 54.
Lathrop v. Judson. 19 Ib., 66.
Kilbourne et al. v. State Inst. 22 Ib., 503.
Sutton et al. v. Bancroft et al. 23 Ib., 320.
Jenkins v. Banning. Ib., 455.
Prentice v. Pickersgill. 6 Wallace, 511.
Campbell v. Wilcox. 10 Ib., 421.

*Second.* And certainly it must be affirmed, as prayed, if

[as at this date, Nov., 1874] no appearance, brief or assignment of errors by Plaintiffs in Error has been filed.

Ryan v. Koch. 17 Wallace, 19.

*Third.* Conceding [which is a long way from the truth] that the special facts found do *not* support the judgment, yet it *does appear* from the findings (R. p. 14, folio 35) that Plaintiffs in Error were not in *position* to raise this question. They were chattel mortgagees (R. p. 8, folio 2), claiming to hold personal property, trees severed from the freehold, and which severance must have been made *prior* to June 3, '67, the date of their last mortgage, (R. p. 13, folio 33) in order that such mortgages *could* attach.

Wagner v. Watts. 2 Cranch. Ct. Ct. 168.

From June 3, '67, to June 11, '67, their mortgagor may have been cutting. (R. p. 11, folio 27.) From June 11, '67, to July 20, '67, (R. p. 11, folio 27, R. p. 13, folio 33) his assignee Piersons may have been cutting. From July 20, '67, when the Plaintiffs in Error entered as mortgagees to seize the property claimed to be covered by their mortgage, to Sept. 12, '67, (R. p. 14, folios 34 and 35) when they abandoned and the vendor (Defendants in Error) entered, the Plaintiffs in Error *appear* to have been cutting, for they claimed to "*operate*" (R. p. 14, folios 34 and 35) this contract under these chattel mortgages and undertook to pay monthly stumpage and annual payments. (R. p. 14, folio 34.) Thus it appears that three parties *might* have have cut these disputed logs *subsequent* to the date of the *last* chattel mortgage.

1st—Cole, under the license in his contract. 2d—Piersons, his assignee under the same license, [conceding the question that (and the law is the other way) a license of this character *is* assignable.] 3d—The Plaintiffs in Error as chattel mortgagees, and clearly as to trees *they* cut they were naked trespassers.

Concede them mortgagees, they had, [by laws of Michigan] even after seizure, only *a lien* upon the *logs* in existence AS SUCH (i. e. lawfully severed *"and removed"* by their mortgagor) *prior* to the date of their last mortgage. This lien could only become *title* by foreclosure and sale in pursuance of the terms of the mortgage.

Flanders v. Chamberlain. 24 Mich., 305

The vendor of their mortgagor, after they relinquished their possession and abandoned, enters, for condition broken, and finds on his land certain of his trees, in logs *"cut"* but not *"removed;"* and the court will observe that the license of the contract is *"to cut and remove."* *Prima facie* then these are *his* property, assuredly his *in possession.* They are seized and taken from the possession of his agents by Plaintiffs in Error. He brings suit and a prima facie case for him is—cut from my land and at the time of seizure peaceably in my possession. License only in part *executed*, "cut" but not "removed," and now revoked. Plaintiffs in Error replies—covered by our chattel mortgage from your vendee, but *when* or "by *whom* cut" we have not put in evidence—" does not appear."

R. p. 14, folio 35.

Are such Plaintiffs in Error in condition to delay for two years the judgment in the record ?

*Fourth.* Again, the agreement of Sept. 1, '66, (B. L. Co. to Cole) being an executory contract "to sell" with license "to *cut and remove*," did not put in Cole a title [to real estate to be afterwards changed to personalty (logs) under a *revokable* license, afterwards in *fact* revoked] which he (Cole) *could* convey by *chattel mortgage* to Plaintiffs in Error, so that they (Plaintiffs in Error) *could* enforce it in *law* by replevin. Assuredly this is true if [which is *this*

case] their license was not acted on fully [logs "cut" but *not "removed"*] previous to its revocation.

*Fifth.* Again, the findings of fact show that *after* B. L. Co. entered into possession of land and logs, for condition broken, they *added* $5,369.64 to the value of the logs, to the date of seizure by replevin by Plaintiffs in Error, and this after the ~~Defendants~~ Plaintiffs in Error had deliberately abandoned their claim and possession, once asserted under the chattel mortgages, to the logs and had refused to pay and discharge the obligations of their written agreement to B. L. Co. of July 20, '67. R. p. 14, f. 34.

To now allow them to hold the *added* value, plus the original value, by replevin, brought against strangers and based on a virtually abandoned chattel mortgage, would be a *fraud* on the B. L. Co. and its legal representatives, the Defendants in Error.

Is not the delay for two years an aggravation of the fraud, and sufficient in the opinion of this court to add one more to the long line of precedents—"judgment affirmed with ten per cent. damages"?

*Sixth.* Lastly, it will be seen from the Record that this was an "all the year round lumbering establishment," "operated" by railroad tracks and locomotives; that it was chiefly *valuable* for its *timber* trees to be made into logs and lumber; that the executory agreement to sell was a heavy one—$27,000; that no part of the consideration was paid down; that the *security* for such consideration rested alone in the title remaining in vendor—*monthly* payments keeping equal step with the wasting away of the security—and a right to the possession of all on breach. Can it be, these being facts, that third parties can intervene between vendor and vendee, and assuming

by written agreement the burdens of the vendee, to fortify their worthless chattel mortgages, they shall be allowed to repudiate those burdens, and falling back on baseless securities deprive the vendor of both *property and security*, (by taking 1¼ million after they have already secured the balance of the 4 million described in their mortgage) and then prolong the litigation for five years, and no redress?

But the end is *near*—"The mills of God grind slowly, yet they grind exceeding small."

It would seem from these general deductions from the special facts found, that upon *principle* the judgment should be affirmed, and so seem the *authorities*.

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AUTHORITIES.

1. The contract of Sept. 1, '66, B. L. Co. with Cole, was "executory"—this is elementary.

1808. Jackson v. Myers. 3 John., 388.
" Same v. Clark. Ibid, 424.
1816. Ives v. Bailey. 13 Ibid, 235.
1834. Atwood v. Cobb. 16 Pick., 227.
1851. Lafferty v. Whiteside. 1 Swan (Tenn.), 123.
1857. Pritts v. Ritchey. 27 Penn. State, 71.
1863. Cole v. Gill. 14 Iowa, 527.

2. No title passed by such executory contract—a corrollary of the foregoing. See same authorities; also,

1853. Burgett v. Bissell. 14 Barb., 640.

3. The license "*to cut and* REMOVE" was good (1) when *wholly* executed—both *cut and removed*—before (2) breach and entry for breach. Or in other words, license revoked.

1849. Doolittle v. Eddy 7 Barb., 74.
1869. Bennett v. Caldwell. 9 Wall., 290.

In the last case Swayne, J., says: "If the contract stip-

"ulates for possession by the vendee, or the vendor puts " him in possession, he holds as licensee. The relation of "landlord and tenant does not exist between the parties. "The case comes within the category of license. Upon "default in payment of any installment of the purchase "money, the possession becomes tortious, and the vendee "may at once bring ejectment."

4. This license was suspended—revoked, by entry of vendor for breach.

1827. Jackson v. Mills. 7 Cow., 747.
1830. Jackson v. Moncrief. 5 Wend., 26.
1853. Seabury v. Stewart. 22 Ala., 207.
1869. Warren v. Richmond. 53 Ill., 52.
1869. McHan v. Stansel. 39 Ga., 197.
1869. Bennett v. Caldwell. 9 Wall. 290.
1870. Little v. Thurston. 58 Me., 86.
Gibbs v. Sullins. 48 Mo., 237.
Doolittle v. Eddy. 7 Barb., 74.

5. No title passed to timber *"cut" under license*, but not *"removed"* before entry for breach.

*a*. Whether it did or *not* is a question Plaintiffs in Error cannot *raise*, it not appearing in the special findings that the timber seized by them had been severed from the freehold prior to date of their last mortgage, and so under the "license."

*b*. Because the license is not *divisible* and was revoked before executed.

*c*. Because the intent and effect of the Cole agreement of Sept. 1, '66, was—B. L. Co. do not part with *title* to any single M until payment made; and the Plaintiffs in Error recognized that "intent and effect" in their *first* mortgage (R. p. 11, folio 27) and agreed (by its acceptance) to take care of it. As also by their agreement of July 20, 1867. R. p. 14, folio 34.

1828. Pease v. Gibson. 6 Greenl., 81.
1863. Hutchins v. King. 1 Wall., 53.

This last case in many of its features is identical with the case at bar.

6. Entry for breach—"*tacitly acquiesced*" in by parties in interest—restored to B. L. Co. both possession and right of property in lands and timbers (unremoved).

A conclusion of the court, showing the added elements of *surrender*, *abandonment*, *acquiescence*, which in effect remove the harshness [though they do not strengthen the law] of naked entry for breach *in invitum*.

7. The seizure was wrongful—a consequence of the facts and law and (*a*) liable in this form of action, *assumpsit*.

Comp. Laws of Mich., 1871. Comp's. § 6,175.
Watson v. Stevens. 25 Mich. 386.
(Cases collected.)

Besides there was an *express assumpsit* in effect to take care that B. L. Co. should not be harmed through the Cole contract. R. p. 11, folio 27, and p. 14, folio 34.

8. And the rule of damages was *more favorable* to the Plaintiffs in Error than the law *always* requires, to wit., the value *at the place of seizure*, with interest from the date of conversion. There are cases (and this ought to be one) when the value at *any time*, up to the day of suit or even trial, should be allowed as just compensation.

9. But the court reduced the damage below the legal standard, from $17,133 to $11,461, and yet they complain ! and for two years—delay.

NORRIS, BLAIR & STONE,
Of Counsel for Defts. in Error.

# Supreme Court of the United States.

## NO. 106.

JENNISON & JENNISON, Plaintiffs in Error,
*vs.*
LEONARD *et. al.*, Defendant in Error.

Since the preparation and printing of points for Defendants in Error in this cause, (No. 106,) counsel for Defendants in Error have been favored with a copy of the *Points* of Plaintiffs in Error, and deem it proper to make the following comments thereon:

To the "*Third*" assignment—

Plaintiffs in Error, brief p. 3, (top.) "The Court erred in finding that a breach of the contract by Cole would defeat the *rights* of the Plaintiffs in Error, under their agreement of July 20, 1867, with the B. L. Co."

*Note.*—All the *rights* they acquired were as chattel mortgagees, to remove such property (logs) as they should show, by proof and *finding*, were covered by their mortgages, *Provided*, first, they paid monthly stumpage; second, the deficiency between monthly stumpage and annual payment, both of which they failed to *do*, though the finding says they expressed themselves *willing* to pay monthly stumpage. No tender of *this* was made.

To the point on page 6, 4th paragraph—

"Cole to *assign* to Company certain Ottawa lands called Swamp Lands, as collateral security for performance of the agreement of September 1, 1866."

The Court will observe this was an *agreement* to "assign."

The special finding does not say this *was done*. In fact, no proof on that point was made. The record shows none.

To the point on same page (6,) paragraph 7—

"If time is of the essence of this contract, then the Plaintiff had a right to enter for breach on certain terms; and if it is *not*, then he had *no* right to enter, and the contract has not been forfeited."

A clear *non sequiter*.

1st. Plaintiff had a right to enter in case of *abandonment*.

2d. He had a right to enter, upon the *absolute* refusal of Cole, or his assignees, to pay at any time.

And the special finding shows both contingencies to have happened before entry.

To point on page 7, paragraph 4—

"Payment is made a condition precedent to a conveyance, but not to possession, or to cutting and removing."

This is not a correct deduction. *Monthly* payments operated as a *safeguard* to cutting and removing without payment. They were so intended and so understood by all parties—vendee and mortgagees. If not, why provide in their first bill of sale or chattel mortgage for *payment* by mortgagees of the plaintiff's *interest* in the mortgaged logs?

To the statement, page 7, paragraph 5—

"The plaintiff *took the Ottawa* lands *as collateral security.*"

It is sufficient to say there is *no such finding*, and it would be unjust to the District Judge to review his law upon facts *not* found. The effect of taking collateral security does not arise—by the record.

In the next paragraph (6,) it is asserted that "it is clear that the parties did not *intend* to make the *time of payment* material."

Then, why, we ask, did they insist upon *monthly* payments—an unusually short period—except upon the theory of no progressive waste, unless progressive compensation.

And the last paragraph of that page (7)—

"Under this rule *the eleven* monthly payments were made, and, on failure to make the 12th, plaintiff entered."

To this we reply: no such finding, (R. p. 14, folio 35.) It shows an *offer* to pay monthly stumpage, but no payment or actual tender. It shows that the entry was for $5,282.76, being for so much of the first instalment as had not been paid by monthly payments.

The finding nowhere gives the number or amount of *monthly* payments.

(R., p. 14, folio 34 and 35.)

Page 8, last paragraph but one—

"In the case at bar the parties had not treated time as material."

Where is that averment sustained? Certainly not in *the finding.*

Again—

"The stumpage was paid up to July, 1867, *only.*"

(*No finding* for that.)

"And yet the defendants were allowed to *go on.*"

Doing what? They don't say *here.* All the Court says in its finding is, (R., p. 14, folio 34, sixth finding,) "*removing timber.*" "Continued to operate removing timber," are the words of the finding. It seems from the brief (p. 10, § 2) that they did more. That they "*cut* and *removed,*" under a *license*, as they call it, the agreement of July 20, 1867!! Whereby Cole having sold and assigned his contract to

Piersons, to the knowledge of all parties, the chattel mortgagees "operating" under their mortgages, to secure advances, take the realty (of Piersons) and convert it into personalty.

But it is idle to follow this.

Page 9, paragraph 5—

"No provision (in agreement) as to what is to be done with swamp lands."

Reply. No *finding* that any swamp lands had been conveyed as collateral or otherwise.

Same page, next paragraph (6.)

"If he (plaintiff) could rescind at all, it is on terms of returning the Ottawa lands and the purchase money received. This must be done in cases of fraud."

*Reply.*—1st. No Ottawa lands received—none *found* in us. 2d. No *purchase money* for land received, only at most $2 per thousand stumpage for timber sold to Defendants in Error for $5 per thousand. See first chattel mortgage or bill of sale. (R., p. 11, folio 27.)

Do they ask us to *give* them the timber without compensation, and rescind, by taking back worthless stump lands, thousands of acres of which are yearly sold for tlaxes?

Page 10, paragraph 2—

The agreement of July 20, 1867, (R., p. 15, folio 34, 35) *claimed* to be a *license* "to CUT and remove!" Facts. They, (Plaintiffs in Error,) as chattel mortgagees, were "removing" timber that *Cole had cut*, and which they had, *by accepting* Cole's first bill of sale, agreed to pay for. They were stopped until they had agreed to assume Cole's payments. They did this, or agreed to do it, as long as they "operated." And they are licensed to CUT and remove!

And this license could not be revoked to the injury of Plaintiffs in Error, they say.

What would happen if Plaintiffs in Error should *abandon* their license and timber, after they had "got away" with nigh three milion of the four million covered by their mortgages, always refusing to pay as they had agreed to do?

But there is still another startling discovery—

That Cole (with no executory contract even—that had gone to Pearson's), and the defendants, chattel mortgagees of Cole "operating," a mortgage under a promise to keep in Cole's shoes, were *tenants at will*, and entitled to *three months'* notice to quit. *Although* the first (Cole) had parted with his interest, possession; and the second, (Jennison) had *abandoned* "*operating*," and the land it was done on, and for near three months made no sign—Sept. 4, '67, to Dec., '67—and then spoke through writs of replevin.

Lastly—The agreement of July 20, 1867, whereby the Plaintiffs in Error agreed to make the payments due and to grow due from Cole, if they were not interfered with in the removal of the timber, they claimed covered by the chattel mortgages, is (on page 12, 2d paragraph) defined to be "a *license* coupled with an *interest*." This definition is not a happy one, the *facts* being considered.

"*Masterly inactivity, hampered by a condition*" would be nearer a correct definition.

In other words, defendants in error say, we shall not assert our superior title to the logs you say you have a mortgage on, *so long* as you meet Cole's payments.

The whole agreement has this extent no more.

They are not satisfied with the refusal (*a matter of discretion, not error*) of the court below to grant new trial.

NOTE.—The affidavit of Church, the attorney of plaintiffs in error, (R., p. 17, folios 42 and 43), to the effect that *Cole* (whom the record shows had no title legal or.

equitable) in Sept., '68, assigned this *contract* to one Gardner, and that the contract on this *assignment* was in full force, etc., and that they were surprised, etc., etc.

Counsel for the defendants in error, in danger of being called home, by imperative business engagements, and now expecting to submit the cause upon paper, has no time to examine the authorities cited by plaintiffs in error. Some nineteen have been referred to, and it is respectfully submitted that, conceding their correctness in point of law (and the cases 8, Metcalf 34 and 15 Gray, 541, are in conflict with many respectable authorities) they are, one and all, inapplicable to the *facts as found* by the Judge in this cause.

9 Mich., 253, is a bill in equity to redeem.

16 Ibid, 40, Land conveyed in exchange for personal property, grantee seeks to repudiate for fraud, cannot get his goods without tendering re-conveyance of land.

8 Ibid, 315. One in possession of land under contract to purchase, is tenant at will, *but* purchasers may waive right to a notice to quit, on default.

But see passim, 9 Wallace, 290, as to the "*tenancy*" question.

11 Paige, 358—

Complainant entitled to specific performance, back payment and interest being tendered by vendee, he having made *valuable improvements*, paid the first two instalments on his land contract, and being only a *few days* behind on his last payment.

28 N. Y., 280.

Land exchanged for other land ("to be measured") and note of $1800, time in which other land was "to be measured" not of the essence of the contract.

34 N. Y., 22.

Defendants in possession of land, under contract of

purchase, and *absolute* license to cut timber, not liable for cutting while license is *operative*, although by eventual non-compliance they forfeit right to land and possession. License being proved, all done up to forfeiture is rightly done. License was—"Now, gentlemen, you can go on and cut timber and manufacture staves."

4 Mass., 504.

Sale of steers and a horse for a horse. To set it aside for fraud, party seeking to rescind, must not keep any of the consideration.

19 Me., 231.

Similar in principle to last.

15 Gray, 54.

Action, trover for timber Plaintiff claimed under mortgage deed Sept. 1, '40. It was purchase money mortgage covering wood cut and *uncut*. Debt secured, due Jan. 1, '41. Mortgage recorded as chattel mortgage in Town Clerk's office, and not in the County Registry. Proof, wood part cut and part uncut on the day the mortgage fell due. Mortgagor sold 1050 feet on the 26th of July, '41. Same day mortgagee showed his mortgage to purchaser and demanded wood; purchaser had no notice of mortgage, except record. Plaintiff claimed that mortgage deed covered all timber cut *before Jan.* 1, '41, *day it was due.* Court *held* it was a mortgage of personal property, "*to take effect as such when the wood timber should be severed from the freehold.*"

Such was the *intention* of the parties, and to make it sure Court *held*, that if the mortgage was void by statute of frauds, so was the sale of wood timber, no title passed to the trees and plaintiff might well recover their own property, the title never having gone from them, etc.

8 Metcalfe, 34.

Defendant entered plaintiffs close to get white oak bark

cut trees and peeled bark, *took it away and used it.* He justified under a parol license. Plaintiff replied, license revoked before bark was removed.

Wilde, J. *held* revoking was too late.

12 Ill., 336.

Sale of a team, wagon and harness. To rescind contract must return property purchased.

24 Ill., 163.

To the same effect.

41 Ill, 195.

As last above.

26 Mo., 116.

A license cannot be countermanded after it *has been* fully *executed*, so as to permit acts *done* (not begun), under it to be treated as trespasses.

26 Pa., 249.

A vendee once in possession of land, under contract of purchase, *but ousted by illegal means*, can recover in ejectment, without bringing into court balance of purchase money. Time not of the essence of the contract unless made so, or * * *indicated by the attending circumstances.*

17 Vt., 200.

Parol contract for sale of growing trees not good.

Discussing right of landlord to re-enter for non-payment of rent, when lease provides for thirty days notice, right of entry not a common law right. Must be reserved in deed.

We respectfully submit to the Court that not alone should this judgment be *affirmed.* It should *in justice* be with damages.

L. D. NORRIS,
*Of Counsel for Defendants in Error*